Supreme Court, U. S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

FAIRFAX COUNTY WIDE CITIZENS ASSOCIATION, *et al.*,

Petitioners,

v.

COUNTY OF FAIRFAX, VIRGINIA, *et al.*,

78-507

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

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No.

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Petitioners,

v.

COUNTY OF FAIRFAX, VIRGINIA, *et al.*,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the decision and judgments of the United States Court of Appeals for the Fourth Circuit in this case.[1]

[1] Petitioners, in addition to Fairfax County Wide Citizens Association, are Gum Springs Civic Association, Springdale Civic Association, William L. and Jeanne G. Paige, Ulysses O. and Ada M. Scott, and Roy and Evelyn A. Brent. Respondents, in addition to County of Fairfax, Virginia, are Joseph Alexander, Martha V. Pennino, John F. Herrity, Alan H. Magazine, Audrey Moore, James M. Scott, Marie B. Travesky, John P. Schacochis, and Warren I. Cikins, individually and as members of the Board of Supervisors of County of Fairfax, Virginia; and Douglas B. Fugate, individually and as Virginia State Highway Commissioner.

OPINIONS BELOW

The opinion of the court of appeals (App. A., *infra*, pp. 1a-14a) is reported at 571 F.2d 1299. The memorandum opinion of the district court (App. D, *infra*, pp. 18a-23a) is not reported.

JURISDICTION

The judgments resulting from the appeal and cross-appeal were entered by the court of appeals on March 6, 1978 (App. B, *infra*, pp. 15a-16a). A timely petition for rehearing and suggestion for rehearing en banc was denied by the court of appeals by its order entered April 28, 1978 (App. C, *infra*, p. 17a). On July 19, 1978, Justice Brennan extended the time for filing a petition for a writ of certiorari to and including September 25, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTION PRESENTED

Whether a district court's jurisdiction to enforce a settlement agreement which terminated a federal civil rights action pending before it is defeated by the fact that the parties are citizens of the same state.

STATEMENT

A. The settlement agreement – its enforcement by the district court

This action was commenced in August 1971 by three civic associations and six black residents of Fairfax County Virginia, alleging racial discrimination in the delivery of public services, in violation of 42 U.S.C. Secs. 1981, 1983, and the Equal Protection Clause of the Fourteenth Amendment. Specifically, plaintiffs alleged that as a result of discriminatory policies and practices of the defendant County, members of its board of supervisors, and Virginia State Highway Commissioner Douglas B. Fugate, the predominantly black neighborhoods of Fairfax County, in contrast to the white neighborhoods, were generally characterized by unpaved and substandard streets, inadequate storm drainage, lack of curbs and gutters, and lack of public sidewalks. Plaintiffs requested a mandatory injunction compelling the defendants to upgrade and pave the streets in question, and to construct adequate drainage facilities, curbs, gutters, and sidewalks (*infra*, pp. 3a-4a). Following the denial of defendants' motions to dismiss, the case was set for trial on June 1, 1971 (*infra*, p. 4a).

On May 31, 1972, following extensive pre-trial discovery, plaintiffs entered into two separate settlement agreements. The first, between plaintiffs and defendant Fugate, required the State to upgrade and pave six streets located in black neighborhoods in Fairfax County (*infra*, p. 4a). The second settlement agreement, between plaintiffs and the County defendants, required the latter to upgrade and pave 76 streets in black neighborhoods within a three-year period (*infra*, p. 4a). In view of the settlement of the litigation, plaintiffs, pursuant to agreement of the parties, moved for dismissal of the suit and on June 1, 1972, the district entered separate orders dismissing the action as to the State and County defendants. (*infra*, p. 5a).

Thereafter, the State substantially performed its obligations under its settlement agreement. However, the County only partly performed its obligations and in the ensuing three years upgraded 25 streets in black neighborhoods. In the spring of 1975, the County concluded that it lacked authority under state law to perform further its obligations under the settlement agreement, and on April 28, 1975, the County's board of supervisors

adopted a resolution repudiating the agreement (*infra*, p. 5a).

On August 7, 1975, plaintiffs moved in the district court under Rule 60(b) (6), F.R. Civ. P.,[2] to vacate the dismissal order of June 1, 1972, and for an order compelling specific performance of the County's settlement agreement. Plaintiffs, in support of their motion, disputed the County's claim that state law prohibited its performance of the settlement agreement and asserted that, in any event, enforcement of the statutes and regulations relied on by the County should be enjoined because they were administered and enforced in an arbitrary, capricious, and racially discriminatory manner (*infra*, p. 6a). On January 30, 1976, under authority of Rule 60(b) (6), F.R. Civ. P., the district court granted plaintiffs' motion to vacate the dismissal and reopened the proceeding against the County (*infra*, p. 6a). Following discovery procedures and a trial of issues pertaining to the County's breach of the settlement agreement, the district court, on November 26, 1976, entered its order directing the County to perform the remainder of the agreement by upgrading and paving 43 streets still in controversy (*infra*, p. 6a).

B. The court of appeals' decision

Appeals from the district court's order were taken by both the County and plaintiffs, the latter claiming that certain additional relief should have been granted. Ruling on

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[2] Rule 60(b) (6), F.R. Civ. P., provides in relevant part that, "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (6) any other reason justifying relief from the operation of the judgment."

the County's appeal, the court of appeals held that, upon the County's repudiation of the settlement agreement which had terminated the litigation pending before it, the district court had authority under Rule 60(b) (6) to vacate its prior dismissal order and restore the case to its docket (*infra*, p. 8a). However, the court of appeals held that upon the district court's vacation of its prior order of dismissal, that court only had authority to restore the case to its trial docket for the purpose of allowing plaintiffs to prove their case and to obtain relief on the merits of their original claim. Thus, the court held, because plaintiff and the County defendants lack diversity of citizenship, the district court did not have jurisdiction to enforce the settlement agreement against the breaching party (*infra*, pp. 13a-14a). Accordingly, the court of appeals reversed the order of specific performance entered by the district court against the County and remanded the proceeding to that court to allow plaintiffs to proceed to the trial of their original case.

In reaching its decision, the court of appeals held that although the original complaint stated a federal civil rights claim over which the district court had jurisdiction, the settlement agreement was a private contract which, because of the nondiversity of the parties, could only be enforced by plaintiffs bringing a separate action in state court (*infra*, p. 13a). Finally, the court of appeals noted that the settlement agreement had not been approved or incorporated into an order of the district court. This omission, the court held, would not have affected the district court's authority to enforce the agreement if there had been an independent ground of federal jurisdiction, such as diversity of citizenship, but since such ground is lacking here the district court was not empowered to enforce the agreement (*infra*, p. 8a).

C. Further proceedings in the district court

Pursuant to the court of appeals' order of remand, the district court set the case down for trial on the basis of plaintiffs' original complaint. Plaintiffs' motion for a stay of proceedings pending the filing of a petition for certiorari was denied by the district court, and trial was held on July 10, 1978. As of September 25, 1978, the date of filing of this petition, the district court still had the matter under advisement.

REASONS FOR GRANTING THE WRIT

I.

The court of appeals' ruling that the district court lacked jurisdiction to enforce the settlement agreement reached in litigation pending before it is totally without precedent in the reported authorities and is in direct conflict with the decisions of at least three other circuits. The Sixth, Third, and Tenth Circuits have specifically held that issues pertaining to compliance with a settlement agreement that terminated litigation in a district court may properly be resolved by that court upon the filing of a supplemental motion or petition in the original proceeding, and that an independent action need not be initiated for such purpose.[3] Since, as these three circuit courts recognize, an action to compel compliance with a

[3] See *Aro Corp.* v. *Allied Witan Co.*, 531 F.2d 1368 (C.A. 6, 1976), cert. denied, 429 U.S. 862; *Kelly* v. *Greer*, 334 F.2d 434 (C.A. 3, 1965); *Kelly* v. *Greer*, 365 F.2d 669 (C.A. 3, 1966), cert. denied 385 U.S. 1035; *Chief Freight Lines Co.* v. *Local Union No. 886*, 514 F.2d 572 (C.A. 10, 1975); *Skyline Sash Co.* v. *Fidelity and Casualty Co. of New York*, 378 F.2d 369 (C.A. 3, 1967), *aff'g* 267 F.Supp. 577 (W.D. Pa., 1966).

settlement agreement may be brought in a proceeding that is supplemental or ancillary to the original suit, there clearly is no need to establish a separate and independent basis of federal jurisdiction for this purpose, as the court of appeals held herein.[4]

The court of appeals' decision in this case should be reversed, not only because it is unprecedented and conflicts with the decisions of other circuits, but also because it poses a serious threat to the efficient administration of justice by discouraging, rather than encouraging, the settlement of cases in the district courts. Seventy-five percent of all cases filed in the district courts are non-diversity cases in which jurisdiction is based either on the fact that the suit involves a federal question or that the United States is a party.[5] In federal question cases, if there is no diversity between the parties, based on the court of appeals' decision, the only way that litigants can be assured that a settlement agreement they might enter into will be enforceable by the court where the case is

[4] The authority to enforce a settlement agreement reached by parties in pending litigation has been said to fall within a federal court's "ancillary jurisdiction." 13 Wright, Federal Practice and Procedure, Sec. 3523, n. 2, citing *Hall* v. *People to People Health Foundation, Inc.*, 493 F.2d 311, 313 n. 3. (C.A. 2, 1974). And see *Ingalls Iron Works Co.* v. *Ingalls*, 177 F. Supp. 151, 154 (N.D. Ala., 1959). It is well settled that absence of diversity of citizenship does not defeat ancillary jurisdiction. *Pacific Railroad of Missouri* v. *Missouri Pacific Railway Co.*, 111 U.S. 505, 522 (1884); *Dugas* v. *American Surety Co.*, 300 U.S. 414, 428 (1937).

[5] Annual Report of the Director of the Administrative Office of the United States Courts, Table C2 (1977). A bill that would abolish diversity jurisdiction passed the House of Representatives on February 28, 1978, by a vote of 266 to 133, and now pending in the Senate. See 124 Cong. Rec. H1553-1561, H1569-1570, 95th Cong. 2nd Sess. (1978).

pending is by having it approved and incorporated into an order of the court. The imposition of such requirements is totally contrary to the more informal practice that is followed by untold numbers of litigants who settle a pending case through agreement and then move for dismissal, as was done in the instant case. In *Haldeman v. United States*, 23 L. Ed. 433, 434 (1876) this Court recognized that:

> Suits are often dismissed according to the agreement of the parties, and a general entry made to that effect, without incorporating the agreement in the record, or even placing it on file.[6]

The formal requirements of approval and incorporation in an order that the court of appeals would impose on parties as conditions of having their settlement agreement enforceable by the court where the case is pending would discourage the informal type settlement that today is frequently resorted to by parties wishing to terminate their litigation quickly and with a minimum of expense. In addition to the extra time and cost to the litigants that is involved in going before a judge and having a settlement agreement incorporated into an order, the requirements that the court of appeals would impose create additional duties for already overburdened federal judges. Before approving a settlement agreement, a judge inevitably

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[6] Also, see for example, *Robinson* v. *E.P. Dutton & Co.*, 45 F.R.D. 360 (S.D. N.Y., 1968); *Albright* v. *R.J. Reynolds Tobacco Co.*, 350 F. Supp. 341, 344, 348 (W.D. Pa., 1972), *aff'd* 485 F.2d 678 (C.A. 3, 1973), cert. denied, 416 U.S. 951; *Bernstein v. Brenner*, 320 F. Supp. 1080 (D.D.C., 1970); *Landau* v. *St. Louis Public Service Co.*, 364 Mo. 1134, 273 S.W. 2d 255 (1954); *Langlois* v. *Langlois*, 5 A.D. 2d 75, 169 N.Y.S. 2d 170 (1957).

must spend time familiarizing himself with its provisions and, in most instances, before the judge will enter an order incorporating a settlement he will require a hearing for the purpose of allowing the parties to explain the agreement and present their respective positions.

It has never been doubted that, "Compromises of disputed claims are favored by the courts." *Williams* v. *First National Bank*, 216 U.S. 582, 595 (1910). Yet, the court of appeals' decision would be a serious impediment to the settlement of a substantial amount of litigation in the federal courts. In a recent 12-month period there were 130,567 civil actions filed in the federal district courts and 92 percent of those cases (excluding land condemnation proceedings) were disposed of without trial.[7] It cannot be doubted that voluntary settlements without formal court action accounted for a substantial number of the cases that were disposed of without trial. However, the court of appeals' decision would in effect eliminate this form of settlement for federal litigants, and thus impair, rather than assist, the efficient administration of justice.

II.

The court of appeals acknowledges in its opinion that its decision conflicts with the Sixth Circuit's ruling in *Aro Corp.* v. *Allied Witan, supra*, where, on facts virtually indistinguishable from those present here, a district court was held to have jurisdiction to enforce a settlement agreement, despite nondiversity of citizenship. The court of appeals herein failed to note, however, that its decision also conflicts, as shown *supra*, n. 3, p. 6, with the Third

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[7] Annual Report of the Director of the Administrative Office of the United States Courts, *supra*, Tables C2, C4 (1977).

Circuit's decisions in *Kelly* v. *Greer*, *supra*, and the *Chief Freight Lines*, *supra*, and *Skyline Sash*, *supra*, decisions of the Tenth and Sixth Circuits, respectively. While it is true that in the latter two cases diversity of citizenship existed between the parties, the decisions are nevertheless relevant here for, if, as those cases hold, a district court has jurisdiction to resolve a dispute over a settlement agreement entered into a suit properly pending before it on the basis of a supplemental petition or motion filed in the original proceeding, there obviously is no reason to require an independent basis for jurisdiction, as the court of appeals herein would have it.

Not only does the court of appeals' decision conflict with the foregoing authorities, but it is also contrary to *Coburn* v. *Cedar Valley Land Co.*, 138 U.S. 196, 221-223 (1891), where this Court specifically rejected the contention that a federal court lacks authority to enforce in the original proceeding a settlement agreement reached in a pending suit. After considering cases from the English courts holding that a separate action for specific enforcement was necessary to enforce certain settlement agreements, the Court held the controlling principle to be that where the agreement covers only matters encompassed by the proceeding in which the agreement was reached, the court has jurisdiction to enforce it by "motion or petition in the original suit." 138 U.S. at 223. See also *Kelsey* v. *Hobby*, 41 U.S. 269, 277 (1842). Since it is unquestioned in the instant case that the settlement agreement is limited to matters encompassed by the complaint, the court of appeals' decision constitutes an unwarranted departure from the authority of the *Coburn* case.

Several other cases similar factually to *Coburn* are cited by the court of appeals in its opinion herein, and although the court seeks to distinguish them on various grounds, those cases

in fact demonstrate a state of the law totally at odds with the court's decision.[8] Thus, the cited cases all illustrate applications of the principle laid down by this Court in the *Coburn* case, that a settlement agreement entered into in a pending case, though it creates contract rights new and different from the rights on which the original claim was based, is nevertheless enforceable on a motion or petition in the original proceeding. In each of the cited cases the parties entered into a settlement agreement contemplating that upon performance of the agreement the action would be dismissed. When breach occurred, the other party sought specific performance in a proceeding that was held to be properly part of the original suit. The common characteristic of such cases is that the settlement agreement is not necessarily intended initially by the parties to be incorporated into the court's order. Rather, it is only after one party breaches the agreement that its terms become incorporated into the order as a means of compelling specific performance. Upon analysis, it is clear that there is no meaningful distinction between cases of that nature and the case at bar. For, after the district court herein vacated its dismissal order and reopened the proceeding in response to plaintiffs' motion under Rule 60(b) (6), this case stood in exactly the same posture as the cited cases, *i.e.*, enforcement was sought of a breached settlement agreement that had been entered into

[8] See *Autera* v. *Robinson*, 419 F.2d 1197 (C.A. D.C., 1969); *Cia Anon Venezolana De Navegacion* v. *Harris*, 374 F.2d 33, 35 (C.A. 5, 1967); *All States Investors, Inc.* v. *Bankers Bond Co.*, 343 F.2d 618, 624 (C.A. 6, 1965), cert. denied, 382 U.S. 830; *Cummins Diesel Michigan, Inc.* v. *The Falcon*, 305 F.2d 721, 723 (C.A. 7, 1962); *Kukla* v. *National Distillers Products Co.*, 483 F.2d 619, 621 (C.A. 6, 1973); *Ingalls Iron Works Co.* v. *Ingalls*, *supra*, 177 F. Supp. at 154-155; *Beirne* v. *Fitch Sanitarium*, 167 F. Supp. 652 (S.D. N.Y., 1958).

with the understanding that the action would be dismissed. Upon the reopening of the original proceeding herein, the district court, no less than the courts in the cited cases, possessed jurisdiction to enforce the settlement agreement as part of the original action, and there was no necessity to regard plaintiffs' motion for specific performance as a new action for jurisdictional purposes.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the decision and judgments of the court of appeals. However, as shown *supra*, p. 6, as of September 25, 1978, the date of filing of this petition, the district court had under advisement its decision in the proceeding on remand from the court of appeals. The district court's decision may be a basis for resolving the controversy between the parties and thus moot the issue presented in this petition. Therefore, petitioners respectfully request this Court to withhold action on the petition, pending the district court's decision. Petitioners will advise the Court as soon as the district court acts on the matter under advisement.

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September 1978

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 77–1190

Fairfax Countywide Citizens Association,
Gum Springs Civic Association,
Springdale Civic Association,
Cooktown Citizens Association,
William L. and Jeanne G. Paige,
Ulysses O. and Ada M. Scott,
Roy and Evelyn A. Brent,
Earnest W. and Margaret E. Gibson,

Appellees,

v.

County of Fairfax, Virginia,
Joseph Alexander,
Mrs. Martha V. Pennino,
John Herrity,
Alan H. Magazine,
Mrs. Audrey Moore,
James M. Scott,
Marie B. Travesky,
John P. Schacochis,
Warren I. Cikins,
individually and members, County of Fairfax Board of Supervisors,

Appellants.

No. 77–1248

Fairfax Countywide Citizens Association,
Gum Springs Civic Association,
Springdale Civic Association,
William L. and Jeanne G. Paige,
Ulysses O. and Ada M. Scott,
Roy and Evelyn A. Brent,

Appellants,

v.

County of Fairfax, Virginia,
Joseph Alexander,
Mrs. Martha V. Pennino,
John Herrity,
Alan H. Magazine,
Mrs. Audrey Moore,
James M. Scott,
Marie B. Travesky,
John P. Schacochis,
Warren I. Cikins,
individually and members, County of
Fairfax Board of Supervisors, and
Douglas B. Fugate, individually,
and as Virginia State Highway Commissioner,

Appellees.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. Oren R. Lewis, Senior District Judge.

Argued January 9, 1978 Decided March 6, 1978

Before WINTER, RUSSELL and WIDENER.

Robert Lyndon Howell, Assistant County Attorney (Frederic Lee Ruck, County Attorney, on brief) for Appellants in 77–1190; John J. Beall, Jr., Assistant Attorney General (Anthony F. Troy, Attorney General of Virginia, Walter A. McFarlane, Deputy Attorney General, on brief) for Appellees in 77–1248; Allison W. Brown, Jr. (Robert M. Alexander; Jack Greenberg and James M. Nabrit, III, on brief) for Appellees and Cross-Appellants.

WINTER, Circuit Judge:

The County of Fairfax, Virginia (County) appeals from an order of the district court directing County to perform its remaining obligations under a 1972 settlement agreement between it and Fairfax Countywide Citizens Association (Association). Because we conclude that the district court lacked jurisdiction to issue the order, we reverse.[1]

I.

In August 1971, several citizens associations located in Fairfax County, Virginia, and six individuals, filed suit in the district court alleging racial discrimination in the delivery of public services in violation of 42 U.S.C. §§1981, 1983 and the Equal Protection Clause of the Fourteenth Amendment. Specifically, plaintiffs claimed that a disproportionate number of unpaved and substandard roads in Fairfax County were located in predominantly black neighborhoods. Plaintiffs prayed a mandatory injunction compelling County to pave and upgrade the roads in question, including the construction of adequate drainage

[1] Association also filed a cross-appeal in this case to require a modification of the district court's order. Because we decide that the district court lacked jurisdiction to enter an order enforcing the settlement agreement, Association's cross-appeal is rendered moot, and we will not consider it further.

facilities, curbs, gutters and sidewalks.[2] In addition to naming County and certain of its officials as defendants to the action, plaintiffs also joined Douglas B. Fugate, the Virginia State Highway Commissioner and chief administrator of the Virginia Highway System. Following a denial of defendants' motions to dismiss, the case was set for trial on June 1, 1972.

On May 31, 1972, following extensive pretrial discovery, plaintiffs entered into two separate settlement agreements. The first, between plaintiffs and defendant Fugate, required the Commonwealth to upgrade six streets located in black neighborhoods in Fairfax County. These streets were already part of the Virginia secondary highway system[3] and therefore, within the jurisdiction of the State Highway Department.[4] The second settlement agreement, between plaintiffs and County, required County to upgrade seventy-six additional roads in black neighborhoods within a three-year period. None of these roads was, at the time of the agreement, included in the Virginia secondary highway system. County, however, promised to "make every effort to have the . . . streets, when improved, taken into the State High-

[2] This was one of many civil rights suits filed in the wake of the Fifth Circuit's decision in Hawkins v. Town of Shaw, Mississippi, 437 F.2d 1286 (1971), aff'd on reh'g, 461 F.2d 1172 (1972), holding that statistical evidence of gross inequalities in the delivery of public services to black and white residents is sufficient to establish a prima facie case of unlawful racial discrimination.

[3] Va. Code §33.1-67 (1950) provides that: "The secondary system of State highways shall consist of all of the public roads . . . in the several counties of the State not included in the State [Primary] Highway System."

[4] Va. Code §33.1-69 (1950) provides that: "The control, supervision, management and jurisdiction over the secondary system of State highways shall be vested in the Department of Highways and the maintenance and improvement . . . of such secondary system of State highways shall be by the State under the supervision of the State Highway Commissioner."

way System." If these efforts proved unsuccessful, County nonetheless recognized a "continuing responsibility to maintain these streets in a fair and equitable manner."

After securing these agreements, plaintiffs moved for dismissal of their claims against State and County. The motion was granted and three dismissal orders, each naming different defendants, were entered on June 1, 1972. The orders each recited that on plaintiffs' motion, and with defendants' consent, the case was dismissed. While Associations' later motion alleged that the settlement agreements were filed in open court (the docket entries do not so recite and the clerk's file does not contain them), the orders themselves did not mention that the parties had entered into settlement agreements; and they neither approved nor incorporated either settlement agreement.

Thereafter, the Commonwealth substantially performed its obligations under the settlement agreement. County likewise commenced performance of its obligations and, in the ensuing three years, upgraded twenty-five roads in black neighborhoods. In 1975, after certain black residents not party to the settlement agreement obtained a permanent injunction preventing County from upgrading one of the subject roads, County reviewed its obligations and determined that the settlement agreement was, at least in part, void as contrary to state law. Following this determination, County's Board of Supervisors passed a resolution, dated April 28, 1975, repudiating the settlement agreement.[5]

[5] Briefly, the Board's conclusion that it lacked authority to continue performing the settlement agreement was reached by this reasoning: State law prohibits local government units from expending funds for the construction, maintenance or improvement of roads not eligible for inclusion in the secondary system of State highways. Va. Code §33.1-225 (1950). To be eligible for inclusion in the State system, there must exist a public right-of-way of not less than thirty feet. Va. Code §33.1-230 (1950). In addition, by regulation of the Highway and Transportation Commission, a road must also service at least three houses per mile in order to be eligible for inclusion in

On August 5, 1975, plaintiffs moved the district court to vacate the dismissal order of June 1, 1972. Plaintiffs did not pray reinstatement of their law suit and an opportunity to try it. Rather, they prayed enforcement of the settlement agreements and, if state law prohibited County's performance, a declaration of the invalidity of the various statutes, regulations and administrative rulings pertaining to the Virginia State Highway System which purportedly prohibited such performance. On January 30, 1976, under authority of Rule 60(b) (6), F.R. Civ. P., the district court vacated its previous order of dismissal; and, on November 26, 1976, it entered an order directing County to upgrade the forty-three roads still in controversy.[6]

II.

Neither in the proceedings in the district court nor in its initial brief filed with this court, did County challenge the jurisdiction of the district court to resolve what had become essentially a contract dispute between the parties. Because it appeared to us that, at the time enforcement

the State system. County believes that nineteen of the forty-three roads still in controversy are permanently ineligible for inclusion either because a thirty-foot public right-of-way is unavailable or because the minimum service requirement is unmet. As to these nineteen, County believes that §33.1-225 absolutely forbids the expenditure of county revenues for paving and other improvements. As to the remaining twenty-four, County believes that, while these are not permanently ineligible, they are presently ineligible in that the requisite public right-of-way has not been obtained. Moreover, says the County, there exists substantial resistance in the affected black neighborhoods to the acquisition by County of the necessary rights-of-way.

[6] The district court rejected County's contentions as set forth in footnote 5, supra, holding in essence that County's past disregard for the statutory prohibition of Va. Code §33.1-225 (1950) estopped it from denying its liability under the settlement agreement to maintain and improve roads not eligible for inclusion in the secondary system of State highways. Because we decide this case on jurisdictional principles, we express no view as to the merits of County's defense to repudiation or the district court's rejection of that defense.

was sought by Association, it was possible that federal subject-matter jurisdiction was lacking, we requested that the jurisdictional issue be briefed and argued. Upon consideration of the various arguments advanced and authorities cited, we conclude that this issue is indeed dispositive and that the district court lacked jurisdiction to enter an enforcement order.

III.

As the sole authority supporting the district court's exercise of federal jurisdiction to enforce the settlement agreement, Association cites Aro Corp. v. Allied Witan Co., 531 F.2d 1368 (6 Cir.), cert. denied, 429 U.S. 862 (1976), a case arising on facts virtually indistinguishable from those in the case at bar.

In the Aro case, Aro Corporation had originally filed an action for patent infringement against Allied Witan Company (Allied) under 28 U.S.C. §1338. Prior to trial, Aro and Allied settled their dispute by means of a licensing agreement, and by stipulation of the parties, the complaint was dismissed. Six weeks later, Allied breached the agreement by refusing to tender the initial royalty payment. Aro thereupon filed a motion under Rule 60(b) (6), F. R. Civ. P., praying both that the district court vacate its prior dismissal order and that Allied be compelled to perform its obligations under the licensing agreement. Defendant challenged the district court's jurisdiction to grant the relief sought; but the district court ruled that it had the requisite subject-matter jurisdiction, 65 F.R.D. 513 (N.D. Ohio 1975), and the Sixth Circuit affirmed, holding first that defendant's repudiation of the settlement agreement constituted "full justification" under Rule 60(b) (6) for reopening the proceedings; and second, that the district court was empowered to enforce the settlement agreement notthstanding the lack of diversity of citizenship between parties. 531 F.2d at 1371.

We are in agreement with the Sixth Circuit that, upon repudiation of a settlement agreement which had terminated litigation pending before it, a district court has the authority under Rule 60(b) (6)[7] to vacate its prior dismissal order and restore the case to its docket. See also Chief Freight Lines Co. v. Local Union No. 886, 514 F.2d 572 (10 Cir. 1975); Kelly v. Greer, 334 F.2d 434 (3 Cir. 1964). We respectfully differ, however, with the Aro Court in its conclusion that, once the proceedings are reopened, the district court is necessarily empowered to enforce the settlement agreement against the breaching party. We are of the opinion that the district court is not so empowered unless the agreement had been approved and incorporated into an order of the court, or, at the time the court is requested to enforce the agreement, there exists some independent ground upon which to base federal jurisdiction.[8]

A district court is a court of limited jurisdiction "[a]nd the fair presumption is (not as with regard to a court of general jurisdiction, that a cause is within its jurisdiction unless the contrary appears, but rather) that a cause is without its jurisdiction till the contrary appears," Turner v. President, Directors and Company of the Bank of North America, 4 Dall. 8, 10, 1 L. Ed. 718, 719 (1799). The burden of establishing jurisdiction is on the party claiming

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[7] Fed. R. Civ. P. 60(b) provides, in pertinent part, that: "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (6) any other reason justifying relief from the operation of the judgment."

[8] Where the settlement agreement is approved and incorporated into an order of court, the district court possesses jurisdiction to enforce its own order. Where there has been no incorporation, it is likely that the "independent ground" most often asserted will be that of diversity of citizenship between the parties to the settlement agreement. 28 U.S.C. §1332. This is not to suggest, however, that other bases of federal jurisdiction may not also be available in appropriate situations, e.g., 28 U.S.C. §§1345, 1346 (United States as party).

it. McNutt v. General Motors Accept. Corp. 298 U.S. 178, 182-83 (1936). After canvassing the possible sources of jurisdiction in the instant case, we do think that Association has not met its burden.

Association's contract claim did not arise "under the Constitution, laws, or treaties of the United States," 28 U.S.C. §1331. The settlement agreement between Association and County, while serving to terminate litigation of a federal claim, was a private contract entered into after private negotiations between the parties. Both its validity and the interpretation of its terms are governed by Virginia law.[9] If, instead of filing a motion under Rule 60(b) (6), Association had filed a new complaint in the district court, alleging breach of contract and seeking specific performance, there is little doubt that the claim would have been dismissed on jurisdictional grounds.[10] See Arvin Industries, Inc. v. Berns Air King Corp., 510 F.2d 1070 (7 Cir. 1975). The same is true if the parties had negotiated and entered into a settlement agreement prior to any litigation, and thereafter Association, alleging the breach of the agreement, sought to invoke federal jurisdiction to enforce it. See Kysor Industrial Corporation v. Pet, Incorporated, 459 F.2d 1010 (6 Cir.), cert. denied, 409 U.S. 980 (1972).

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[9] It is true that, in its motion seeking specific performance of the settlement agreement, Association asked the district court to declare unconstitutional any state law prohibiting County's performance. While this presents a potential federal question, it is well established that §1331 jurisdiction obtains only if federal law "creates the cause of action." American Well Works Co. v. Layne § Bowler Co., 241 U.S. 257 (1916). See also Louisville & Nashville R.R. v. Motley, 211 U.S. 149 (1908). At the time enforcement was sought, Association's "cause of action" was for breach of contract – a claim arising under state law.

[10] Since both parties to this litigation are citizens of Virginia, no jurisdiction would obtain under 28 U.S.C. §1332, nor does there exist any special statutory grant of jurisdiction empowering the district court in the instant case to take cognizance over the contract dispute.

Thus, since there is neither federal question nor diversity jurisdiction in the instant case, we must look elsewhere if the jurisdiction of the district court is to be sustained.[11] In Aro, the Sixth Circuit advanced what appeared to be alternative jurisdictional theories and we turn to them.

First, it was said that "courts retain inherent power to enforce agreements entered into in settlement of litigation pending before them." 531 F.2d at 1371. See also United States v. Newport News Shipbuilding and Dry Dock Co., —— F.2d——, —— (4 Cir. 1978) (dictum); Meetings & Expositions, Inc. v. Tandy Corp., 490 F.2d 714, 717 (2 Cir. 1974); Kukla v. National Distillers Products Co., 483 F. 2d 619, 621 (6 Cir. 1973); Massachusetts Casualty Insurance Co. v. Forman, 469 F.2d 259, 260 (5 Cir. 1972); Autera v. Robinson, 419 F.2d 1197, 1200 (D.C. Cir. 1969); Kelly v. Greer, 365 F.2d 669, 671 (3 Cir. 1966), cert. denied, 385 U.S. 1035 (1967); Cummins Diesel Michigan, Inc. v. The Falcon, 305 F.2d 721, 723 (7 Cir. 1962).

While this principle is sound under appropriate circumstances, it is not a principle of federal jurisdiction. An analysis of the cases cited by the Aro court in support of the principle shows that, except for one, they all concerned settlement agreements which were intended to be incorporated into final orders [12] or for which independent federal

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[11] Certainly Rule 60 supplies no grant of jurisdictional authority. It merely permits a district court to try the original cause of action when the district court concludes that the ends of justice warrant reinstating the original claim.

[12] Kukla v. National Distillers Products, supra; Cia Anon Venezolana de Navegacion v. Harris, 374 F.2d 33 (5 Cir. 1967); All States Investors, Inc. v. Bankers Bond Co., 343 F.2d 618 (6 Cir. 1967).

In each of these cases, parties to litigation pending in district court had entered into an agreement prior to final judgment whereby defendant consented to a judgment in favor of plaintiff; but prior to entry of judgment, defendant had repudiated. Rather than

jurisdiction existed.[13] The single exception was a state case which involved a court of general, not limited, jurisdiction.[14] Likewise, in Newport News Shipbuilding and Dry Dock Co., a recent decision of this court where the principle was repeated with approval, the jurisdiction of the district court was not at issue.[15]

In our view, the inherent power of a district court to enforce settlement agreements, like any other power inherently vested in a federal court, presupposes the existence of federal jurisdiction over the case or controversy.

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remitting plaintiff to proof of his entire case, the district court entered judgment in accordance with the terms of the repudiated agreement. The settlement agreement was thus viewed as a stipulation on the merits of the original claim whereby defendant admitted liability. See also Cummins Diesel Michigan, Inc. v. The Falcon, supra.

[13] Meetings and Expositions, Inc. v. Tandy, supra. See also Massachusetts Casualty Ins. Co. v. Forman, supra; Autera v. Robinson, supra; Skyline Sash, Inc. v. Fidelity and Casualty Co., 378 F.2d 369 (3 Cir. 1967), aff'g, 267 F.S. 577 (W.D. Pa. 1966); Kelly v. Greer, supra.

[14] Melnick v. Binenstock, 318 Pa. 533, 179 A. 77, 78 (1935) ("A compromise or settlement of litigation is always referable to the action or proceeding in the court where the compromise was effected; it is through that court the carrying out of the agreement should thereafter be controlled.")

The principle of a court's inherent power to enforce settlement agreements appears to have had its origins in state-court decisions. However, since state courts, unlike federal courts, are courts of general jurisdiction, state courts generally need not concern themselves with the source of their jurisdictional authority over a dispute. Therefore, a statement such as found in Melnick should not be construed as a jurisdictional statement; nor should it be relied upon, as it was in Aro, in resolving an issue of Federal jurisdiction.

[15] Because in Newport News Shipbuilding and Dry Dock Co. the United States was a party to the settlement agreement, subject-matter jurisdiction clearly existed on independent grounds.

As a second alternative ground for upholding federal jurisdiction, both the district court and the court of appeals in Aro invoked a concept of derivative jurisdiction. Because the settlement agreement resolved the dispute giving rise to the original litigation over which the district court had jurisdiction, any dispute involving the agreement itself was likewise properly before the court. As stated by the district court: "[J]urisdiction rests on the same footing as when the case began. . . ." 65 F.R.D. at 514. The court of appeals developed the point as set forth in the margin.[16]

It is, of course, well established that, under appropriate circumstances, a federal court may exercise derivative jurisdiction over a dispute despite the absence of an independent basis for federal jurisdiction. The doctrines of both pendent and ancillary jurisdiction fall within this category. See, e.g., Moor v. County of Alameda, 411 U.S. 693, 714-15 (1973) (dictum); United Mine Workers v. Gibbs, 383 U.S. 751 (1966); Dery v. Wyer, 265 F.2d 804 (2 Cir. 1959). We think, however, that derivative jurisdiction should be grounded on something more substantial than a mere showing that the settlement agreement would not have been entered into but for the existence of litigation pending in federal court.

Consideration of the rationale of Gibbs and Dery supports this conclusion. In each, derivative jurisdiction was upheld only because the claim for which no independent jurisdiction existed derived from the same nucleus of operative facts

[16] As stated in 531 F.2d at 1371:

> The Agreement in question is not merely a patent license. It is also the contractual vehicle by means of which the parties reached agreement settling their litigation. Both types of agreements are contracts; but a settlement agreement is more than a patent license. . . . To permit the absence of diversity to divest the court of jurisdiction after settlement, when it could not have done so prior to settlement, would be to exalt form over substance and to render settlement in such cases a trap for the unwary. The license cannot be separated from the purpose of its birth.

as the claim for which there did exist independent jurisdictional grounds. For reasons of economy, reasoned the courts, it makes little sense to remit one of two related claims to state court since the same facts will form the basis of decision in both.[17]

That consideration is absent here. Association's contract claim is factually and legally distinct from the claim giving rise to the original litigation. To remit Association to state court in order to have its agreement with County enforced will not create duplicating litigation since the operative facts bearing on the validity of the agreement bear no relation to those underlying Association's §1983 claim.

While not relying on the sort of economy interest upon which the doctrines of pendent and ancillary jurisdiction are based, Aro nonetheless suggests that to divest a district court of jurisdiction to enforce a settlement agreement in cases such as this will "render settlement . . . a trap for the unwary." 531 F.2d at 1371. We think that this is not so. As in the instant case where federal jurisdiction to sue for a breach of a settlement agreement does not otherwise exist, a plaintiff who claims a breach of his settlement agreement has available two courses of action. He may take his contract claim to state court where he may seek enforcement of the settlement agreement. Because enforceability is likely to turn on questions of state law, the state court is an appropriate forum for resolving this dispute.[18] Alternatively, the injured plain-

[17] A recent note suggests that even this rationale is overly expansive when due weight is given to the fact that federal courts are courts of limited jurisdiction. The note argues that consistent with Article III of the Constitution pendent jurisdiction should be recognized only when the rights created by state and federal law are substantially identical, irrespective of the factual predicate giving rise to the assertion of those rights. Note, The Concept of Law-Tied Pendent Jurisdiction: Gibbs and Aldinger Reconsidered, 87 Yale L. J. 627 (1978).

[18] In the instant case, the state forum is particularly appropriate because of the complexity of the state law questions involved. See footnote 5, supra; Note, Virginia Subdivision Law: An Unreasonable Bur-

tiff may file a Rule 60(b) (6) motion in federal court, requesting that the prior dismissal order be vacated and the case restored to the court's trial docket. This restores the litigants to the *status quo ante* and allows the plaintiff to prove his case and obtain his relief on the merits of the underlying claim.

IV.

To summarize: We find no independent basis for asserting jurisdiction over the contract dispute, and we see no considerations of either judicial economy or fairness requiring the settlement agreement to be enforced in federal court. We therefore conclude that the district court lacked jurisdiction to enforce the agreement. We reverse the order of the district court compelling County to perform its remaining obligations under its agreement with Association. We do not disturb the portion of the district court's order which struck its order of dismissal. Association may proceed to the trial of its original claim if it be so advised.

REVERSED AND REMANDED

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den on the Unwary, 34 Wash. & Lee L. Rev. 1223 (1977). While we do not question the competence of the district court to resolve these questions, it is nonetheless preferable, when a decision requires interpretation of statutes establishing a state administrative or regulatory regime, that such interpretation be authoritatively made in the state-court system. Cf. Railroad Commission of Texas v. Pullman Co., 312 U.S. 496, 498-500 (1941).

APPENDIX B

JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 77–1190

APPEAL FROM the United States District Court for the Eastern District of Virginia.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by Counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed. This case is remanded to the United States District Court for the Eastern District of Virginia, at Alexandria, consistent with the opinion of this Court filed herewith.

/s/William K. Slate II

[Filed March 6, 1978] CLERK

JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 77–1248

APPEAL FROM the United States District Court for the Eastern District of Virginia.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed. The case is remanded to the United States District Court for the Eastern District of Virginia, at Alexandria, consistent with the opinion of this Court filed herewith.

/s/William K. Slate II

CLERK

[Filed March 6, 1978]

APPENDIX C

[Filed 4/28/78]

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. Oren R. Lewis, District Judge.

Upon consideration of the appellee/cross-appellants petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc.

IT IS ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Winter for a panel consisting of Judge Winter, Judge Russell and Judge Widener.

FOR THE COURT,

/s/William K. Slate, II

CLERK

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

FAIRFAX COUNTYWIDE CITIZENS ASSOCIATION, et al.,	:	
Plaintiffs	:	
v.	:	Civil Action No. 71-336-A
COUNTY OF FAIRFAX, VIRGINIA et al.,	:	
Defendants	:	

MEMORANDUM OPINION

This suit was originally brought in this court in 1971 as a civil rights action for declaratory judgment and injunctive relief – The plaintiffs alleged discrimination in the provision of public services for the black residents of Fairfax County and the Town of Herndon.

Considerable pretrial discovery took place and both parties were prepared for trial scheduled for June 1, 1972.

In the interim the parties had been attempting to compromise and settle their differences.

They reached agreement on May 31, 1972 and entered into separate settlement agreements with the County Board of Supervisors, the Town of Herndon and the defendant Fugate.

On June 1, 1972, the day following execution of the settlement agreements, the plaintiffs moved to dismiss their claims against the County of Fairfax, the Town of Herdon

and the defendant Fugate on the ground that the matter in controversy had been compromised and settled – The case was then dismissed.

All of the defendants proceeded with the work provided for in the said settlement agreements.

The plaintiffs admit that the Town of Herndon has done what it agreed to do and that the defendant Fugate has upgraded the streets in the Virginia secondary highway system as provided for in the June 1st agreements – They further admit that the County of Fairfax has done considerable work under its agreement – It has upgraded over 25 roads, and has been successful in having the State include several of the upgraded streets into the secondary road system.

The County now says it will not complete the upgrading of the remaining roads as provided for in the settlement agreement – The Fairfax County Board of Supervisors adopted a resolution on April 28, 1975 so stating.

The plaintiffs immediately thereafter moved the Court to vacate the June 1, 1972 dismissal order and to reinstate the suit, and to compel the County of Fairfax to upgrade the roads as called for in its settlement agreement.

The motion to reopen was heard shortly thereafter, and both parties advised the Court they wanted time to further negotiate in the hopes that they might settle their differences to the satisfaction of the citizens living in the so-called black communities, many of whom were not then knowledgeable of the contents of the settlement agreements and many of whom purportedly did not want the thoroughfares in front of their residences made into public streets.

Although some further compromises and settlements were reached as to some of the streets, much remained to be done when the motion to reopen was again heard by the Court on June 21, 1976.

The County now contends that the original settlement agreement was illegal because it could not upgrade or improve streets in the County that did not meet the minimum requirements for inclusion in the state secondary highway system – it also claims mutual mistake and misrepresentation of material facts.

The County now wants to modify the settlement agreement to allow all residents along the P.6 roads in question which meet the state requirements for service, who wish their road to become public, to dedicate the necessary thirty feet of right-of-way. The County then would upgrade those roads so they could be accepted into the state secondary system.

The plaintiffs want the settlement agreement performed as written.

The pertinent portions of the settlement agreement provide that –

(1) The County agrees to upgrade the P.6 streets (attached hereto) – At a minimum, the P.6 streets shall be paved. Consistent with the above and the reasonable desires of the existing residents, the P.6 streets will be brought as closely as possible to existing surrounding area standards.

(2) The County will make every effort to have the P.6 streets, when improved, taken into the state secondary highway system – If unsuccessful, the County recognizes their continuing responsibility to maintain these streets in a fair and equitable manner.

(3) The plaintiffs will use their best good faith efforts to assist the County with any land acquisition problems.

The record here made discloses that the County has spent more than a half million dollars and has been working on the roads in question for more than three years.

Seven of the P.6 roads have been accepted into the state highway system – Sixteen are being readied for acceptance by the State.

The plaintiffs have agreed to drop six of the P.6 roads because they serve no public purpose – They also have agreed to drop Ransell Road because of severe resident opposition.

Of the remaining 45 P.6 roads, 36 are private, 7 are partly private and partly dedicated, and 2 are completely dedicated – Of the 36 private roads, 2 are partially outside of the jurisdictional limits of Fairfax County.

The county survey made long after the settlement agreement discloses that many of the private roads are ineligible for acceptance into the state system due to insufficient service – and on those which completely or partially meet the state requirements for service, at least one resident indicated he would not be willing to grant the County a 15-foot right-of-way from the centerline of the existing travelway in return for public maintenance.

The County's belated claim that it is illegal for the County to spend money to upgrade and maintain P.6 roads that do not qualify for acceptance into the state system is without merit.

The record shows that the County has, both before and after the date of the settlement agreement, upgraded and paved many of the P.6 roads which were not then or are not now eligible for inclusion in the state road system under the existing statutory requirements – and has continued to maintain many of them.

Fairfax had many roads that did not meet the state requirements for inclusion in the state secondary road sys-

tem prior to the adoption of the so-called Byrd Road System.

Practically all of these old roads, with the exception of the P.6 roads in question, have been acquired and upgraded by the County and are now a part of the state secondary road system.

The County gives no reason for its failure to acquire these P.6 roads and to upgrade them so they might become eligible for inclusion in the state system.

After this suit was filed charging the County with discrimination in furnishing public services for the black residents of the County (these P.6 roads are all within Fairfax County's so-called black communities), the County Board agreed to upgrade these P.6 streets – at a miminum by paving – and to make every effort, when improved, to have them taken into the state secondary system.

If unsuccessful, the County Board agreed to maintain them in a fair and equitable manner.

They now say, in support of their charge of mutual mistake and/or misrepresentation, that they did not know when they signed the agreement that many of these P.6 streets had not been dedicated to public use by prescription or otherwise.

If they did not know who owned the requisite right-of-way, all they had to do was to search their own land records. All of the P.6 streets were in use and open and obvious to the county officials for many years.

There is no evidence of any misrepresentation on the part of the plaintiffs – To the contrary, paragraph three of the settlement agreement provides that the plaintiffs will use their best good faith efforts to assist the County with any land acquisition problems.

The County now wants the Court to modify the agreement to require the adjacent landowners to dedicate the necessary rights-of-way as a condition precedent to its upgrading and paving the P.6 streets.

Courts do not modify agreements – They determine only whether they are valid and enforceable.

The agreement in question is clear and unequivocal – Performance is neither illegal nor impossible.

At a minimum the P.6 streets shall be paved and brought as closely as possible to existing surrounding area standards.

If the County is unsuccessful in having them taken into the state system, it should maintain them in a fair and equitable manner.

The County can acquire the necessary rights-of-way, if needed for paving and maintenance, by gift, purchase, prescription or condemnation, and upgrade the streets sufficient for inclusion into the secondary road system, thereby relieving the County from future maintenance.

This suit was dismissed by the plaintiffs in good faith – The County has not lived up to its part of the bargain.

Therefore the June 1, 1972 order of dismissal will be vacated, the suit reinstated, and an order will be entered requiring the Board of Supervisors of Fairfax County to perform its part of the May 31, 1972 settlement agreement within a reasonable period of time.

Counsel for the plaintiffs will prepare an appropriate order pursuant to the foregoing, submit the same to counsel for the defendant for approval as to form, and then to the Court for entry.

The Clerk will send a copy of this memorandum opinion to all counsel of record.

/s/Oren R. Lewis

September 27, 1976 United States Senior Judge

Supreme Court, U. S.
FILED
OCT 24 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-507

FAIRFAX COUNTY WIDE CITIZENS ASSOCIATION, *et al.*,

Petitioners,

v.

COUNTY OF FAIRFAX, VIRGINIA, *et al.*,

Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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OCTOBER TERM, 1978

No.

FAIRFAX COUNTY WIDE CITIZENS ASSOCIATION, *et al.*,

Petitioners,

v.

COUNTY OF FAIRFAX, VIRGINIA, *et al.*,

Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Respondent Board of Supervisors, by and through its counsel, Frederic Lee Ruck, and Richard A. Golden, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Fourth Circuit's opinion in this case.

REFERENCE TO OPINION BELOW

Respondent Board of Supervisors adopts the opinion as set forth in "Appendix A" of Petitioners' Brief.

QUESTION PRESENTED

Should the Supreme Court grant a Writ of Certiorari to review a case involving an alleged litigation settlement agreement wherein one party has repudiated the agreement and the other party has subsequently forced a trial on the merits of the underlying dispute?

COUNTER-STATEMENT OF THE CASE

The respondent Board adopts as accurate, the opinion set forth on pages 1a through 14a of the Petitioners' Petition.

In addition, respondent Board submits that after the Court of Appeals rendered its opinion on March 6, 1978, the following occurred:

1. The matter was remanded to the District Court. See p. 6, Petitioner's Brief.

2. The District Court held a hearing in late March, 1978, and allowed the petitioners an opportunity to dismiss, without prejudice, their action in that court and thus permit them to proceed to State court to enforce their alleged settlement agreement.
3. Petitioners rejected the opportunity to dismiss their suit, and proceeded, in accordance with the provisions of the decision of the Court of Appeals, to try their underlying case on the merits. Trial was held on July 10, 1978. No decision has been rendered. See p. 6, Petitioners' Brief.
4. Petitioners filed their present Petition for a Writ of Certiorari.

REASONS FOR DENYING THE WRIT

Further Appeal is moot because:

A. Both parties have rejected the settlement agreement.

1. Respondent rejected it in 1975 (See p. 5a of Petitioners' Petition).

2. Petitioners rejected it in 1978 by declining to dismiss the underlying cause of action and forcing the Respondent to defend the case on its merits at the July 10, 1978 trial. See, e.g., Buck's Stove & Range Co. v. American Federation of Labor, 219 U.S. 531, 31 S.Ct. 472, 55 L.Ed. 345 (1911).

B. Petitioners have accepted the benefits of the decision and judgment of the Court of Appeals of March 6, 1978. Particularly, the Court of Appeals gave the Petitioners an opportunity to have the 1972 dismissal set aside pursuant to Fed. R. Civ. P. 60(b)6, and have the case brought to trial. Petitioners have accepted the benefits of the Court of Appeals Judgment and have forced the Respondents to trial on the merits. By forcing the Respondents to a trial on the merits, they have rejected the alleged "settlement agreement," and they can no longer claim that the parties have "settled" the matter. See, e.g., Chicago Great Western Ry. Co. v. Beecher, 150 F.2d 296, cert. denied, 326 U.S. 781, 66 S.Ct. 339, 90 L.Ed. 473 (1946).

CONCLUSION

Respondent Board of Supervisors prays that this court enter an appropriate order denying a Writ of Certiorari.

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In The

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October Term, 1978

No. 78-507

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COUNTY OF FAIRFAX, VIRGINIA, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Meetings and Expositions, Inc. v. *Tandy*, 490 F.2d 714 (2d Cir. 1974)	7
Skyline Sash Co. v. *Fidelity and Casualty Co. of New York*, 379 F.2d 369 (3d Cir. 1967), *aff'g* 267 F.Supp. 577 (W.D. Pa. 1966)	5
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In The

Supreme Court of the United States

October Term, 1978

No. ——

FAIRFAX COUNTY WIDE CITIZENS ASSOCIATION, et al.,

Petitioners,

v.

COUNTY OF FAIRFAX, VIRGINIA, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Respondent Douglas B. Fugate, individually and as State Highway Commissioner, by counsel, respectfully requests that the Court deny the Petition for a Writ of Certiorari seeking review of the Opinion in this matter of the Court of Appeals for the Fourth Circuit.

QUESTION PRESENTED

Whether, after the entry of a dismissal order not incorporating a settlement agreement which settled a cause of action as to which federal jurisdiction existed, there must be an independent federal jurisdictional base to enforce said agreement.

STATEMENT OF THE CASE

Respondent Fugate supplements the Statement of the Case presented by Petitioners, hereinafter "Association". Respondent Fugate believes that he is no longer a party litigant in this matter. That belief is buttressed by statements in Petitioners' Petition at p. 4 describing the proceedings below. That belief is shaken, however, by the fact that the Association served their Petition for a Writ of Certiorari upon Respondent Fugate.

To advise the Court of the posture that Respondent Fugate believes himself to be in, he submits the following remarks. The district court's memorandum opinion (Petitioner's Petition, Appendix D, pp. 18a to 23a) speaks only as to the County Respondents. The order of November 26, 1976 which followed this opinion expressly reopened the litigation only as to the County Respondents and compelled performance of the agreement they entered into. *See* Appendix A to this Brief in Opposition.

The County Respondents appealed the district court's order and the Petitioners cross-appealed the district court's order because it failed to provide certain affirmative relief requested by Petitioners and the dismissal of defendant Fugate from the proceedings.

The court of appeals of the fourth circuit reversed the district court's decision where it compelled performance of the settlement agreement entered into between the Association and the County Respondents holding that the district court had no jurisdiction to enforce the agreement. The Court of Appeals agreed that the trial of the original claim at the district court level could be reopened. *See* Petitioners' Petition, Appendix A, p. 14a.

After a reconsideration request filed by Petitioners was denied by the Court of Appeals, the Association then chose

to go to trial solely against the County Respondents on the merits of their original claim. The outcome of that trial, conducted July 10, 1978, is still pending. *See* Respondent County's Brief in Opposition, p. 3.

Accordingly, it is Respondent Fugate's belief that there exists no appeal as to him, and that he is no longer a party litigant either in this Court or in the district court.

REASONS FOR DENYING THE WRIT

I

The Right To Relief From This Court Has Been Waived

If the Writ of Certiorari is granted by the Court, such grant should be limited to the issue between the Association and the County Respondents. The posture of Respondent Fugate is set out in the Statement of the Case herein and will not be restated.

It is submitted that upon the entry of the opinion and order of the court of appeals for the fourth circuit, the Association was left with two mutually exclusive alternatives. It could either go to trial under the original claim or appeal to this Court. The Association chose to go to trial and although in trying the case it chose only to go against the County Respondents, by choosing this cause of action it has waived any right to ask this Court for a remedy as to Respondent Fugate.

II

The Alleged Conflict Among The Courts Of Appeal Created By This Decision Is More Apparent Than Real

Petitioner recites that the decision appealed is in conflict with decisions of other courts of appeal, namely the third, sixth and tenth circuits.

Respondent Fugate submits, however, that the jarring conflict necessary to trigger this Court's intervention is not present. The cases cited in the third and tenth circuits represented to be an "all fours" with the instant case, and decided in favor of jurisdiction, are not similar when factually examined.

Here, the settlement agreement was not filed in open court; the orders do not recite that a settlement agreement had been entered into; nor was any settlement agreement approved or incorporated into the dismissal order. *See* Petitioners' Petition, Appendix A, p. 5a; *Fairfax Countywide Citizens Association, et al.* v. *County of Fairfax, Virginia, et al.*, 571 F.2d 1299, 1301 (4th Cir. 1978).

Further, it was nearly three years after entering into the settlement agreement, and after the dismissal orders had been entered, that the County Respondents concluded that they did not have the requisite statutory power authorizing them to carry out the entire settlement agreement. *See* Petitioners' Petition, p. 3; Petitioners' Petition, Appendix A p. 5a; 571 F.2d at 1301. Until then, the County Respondents had proceeded to implement their settlement agreement.

In *Kelly* v. *Greer,* 334 F.2d 434 (3d Cir. 1964) and *Kelly* v. *Greer,* 365 F.2d 669 (3d Cir. 1966), *cert. denied,* 385 U.S. 1035 (1967), two of third circuit cases relied upon by the Association, the district court had postponed trial on a day-to-day basis to facilitate settlement. In fact, the district judge had remained in his chambers until 10:00 p.m. on January 22, 1963. Then, in the presence of the court, counsel for the parties read into the record the settlement agreement reached. The agreement called for the pending suits to be dismissed with prejudice. The District Court dismissed the litigation that very evening. When one of the parties failed to live up to the settlement, relief was sought. The third circuit in the first *Kelly* v. *Greer,* ruled, as did the

fourth circuit here, that Fed. R. Civ. P. 60(b) authorized the vacation of the dismissal order. In the second *Kelly* v. *Greer,* 365 F.2d at 671, the third circuit approved the district court's enforcement of the settlement agreement because it found that the "settlement agreements were entered into with its approval."

In *Skyline Sash Co.* v. *Fidelity and Casualty Co. of New York,* 379 F.2d 369 (3d Cir. 1967) *aff'g* 267 F.Supp. 577 (W.D. Pa. 1966) the settlement agreement had been concluded in the chambers of the district judge. The settlement was in the reporter's transcript.

In *Chief Freight Lines Co.* v. *Local Union No. 886,* 514 F.2d 572 (10th Cir. 1975), a tenth circuit decision relied on by the Association to show conflict, the issue was simply whether the district court had the power to reopen a case dismissed without prejudice under Fed. R. Civ. P. 60(b). There was no mention of enforcing the settlement stipulation. Further, this was a labor case for which separate federal jurisdiction exists under 28 U.S.C. § 1331 *et seq.* and Title 29 of the U.S. Code.

In the third circuit cases, the settlements had been, in effect, presided over by the district courts. The tenth circuit case never went into the enforcement of the settlement stipulation *per se*. Hence the spector of conflict between the fourth circuit and the third and tenth circuits is but a mirage.

As to the six circuit decisions, the fourth circuit acknowledged that the sixth circuit decision in *Aro Corp.* v. *Allied Witan Co.,* 531 F.2d 1368 (6th Cir. 1976), *cert. denied,* 429 U.S. 862 (1976) arose on facts virtually indistinguishable from the instant case. 571 F.2d at 1302; Petitioners' Petition, Appendix A, p. 7a. The court of appeals noted, however, that in *Aro, supra,* the sixth circuit, in effect, had relied upon the decision of a court of general jurisdiction, a

Pennsylvania state court to reach its finding that the district courts had "inherent power to enforce agreements entered into in settlement of litigation pending before them, 531 F.2d at 1371." 571 F.2d at 1304. Further, the egregious nature of the settlement repudiation in *Aro, supra,* undoubtedly led the sixth circuit to exercise jurisdiction and enforce the settlement agreement. Id. and 531 F.2d at 1370. It is that factual distinction from the instant case that renders any conflict between the sixth circuit and the fourth circuit more apparent than real. In essence the conflict, if one exists, arises from the application of different facts by two distinct courts to the principle of integrity of the court itself which leads to different results. In context both are correct.

Petitioners also cite the decision complained of as being in conflict with *Coburn* v. *Cedar Valley Land Co.,* 138 U.S. 196, 221-223 (1891). A review of that case reveals that Cedar Valley Land Company was an English corporation, hence diversity jurisdiction was present.

Petitioners list a number of cases in footnote 8, p. 11 Petitioners' Petition and argue that the fourth circuit's decision fails to distinguish accurately those cases. It is submitted that these cases can all be distinguished.

In *Autera* v. *Robinson,* 419 F.2d 1197 (D.C. Cir. 1969), no dismissal order had ever been entered ending the litigation. In fact, the question before the court of appeals concerned the nature of the hearing required to enforce an oral settlement agreement. In *Cia Anon Venezolana De Navegacion* v. *Harris,* 374 F.2d 33 (5th Cir. 1967), no final dismissal order had been entered either. The same facual setting existed in *All States Investors, Inc.* v. *Bankers Bond Co.,* 343 F.2d 618 (6th Cir. 1965), *cert. denied,* 383 U.S. 830 (1965) and *Kukla* v. *National Distillers Products Co.* 483 F.2d 619 (6th Cir. 1973).

Independent federal jurisdiction existed for the court's actions in *Cummins Diesel Michigan, Inc.* v. *The Falcon,* 305 F.2d 721 (7th Cir. 1962) (Admiralty); diversity jurisdiction existed in *Meetings and Expositions, Inc.* v. *Tandy,* 490 F.2d 714 (2d Cir. 1974) and *Massachusetts Casualty Ins. Co.* v. *Forman,* 469 F.2d 259 (5th Cir. 1977) and apparently in *Ingalls Iron Works Co.* v. *Ingalls,* 177 F.Supp. 151 (N.D. Ala. 1959) and *Beirne* v. *Fitch Sanitarium* 167 F.Supp. 652 (S.D. N.Y. 1958). In *Beirne* no final dismissal order has been entered nor does it appear that one had been entered in *Ingalls* either.

Thus the court of appeals for the fourth circuit quite properly distinguished them from the facts extant in this case.

III

The Decision Of The Court Of Appeals For The Fourth Circuit Did Not Deviate From The Normal So As To Warrant The Exercise Of This Court's Power Of Supervision

The court of appeals for the fourth circuit has not "so far departed from the accepted and usual course of proceedings." R. Sup. Ct. 19 (1) (b). The decision is consistent with other circuits' decisions finding that Fed. R. Civ. P. 60(b) was an appropriate vehicle to put the litigants to the *status quo ante.* The decision rested on the theory that district courts are courts of limited jurisdiction and no jurisdiction exists in a particular case until it can be established that jurisdiction over the subject matter exists. *Turner* v. *President, Directors and Company of the Bank of North America,* 4 Dall. 8 (1799).

The court of appeals holding or opinion has not struck out on new uncharted ground nor does it reflect an unwillingness to acknowledge either this Court's rulings or enactments of Congress. The decision is well reasoned and in consonance with other precedents.

IV

The Issue On The Merits Is Moot

On the merits of the dispute, the County Respondents relied heavily on the proposition that state law prevented them from upgrading and maintaining roads which cannot be accepted into the secondary system of State highways.

In 1978 the General Assembly changed a 46 year statutory scheme which prevented counties from expending county revenues to maintain roads. At the same time the statutory scheme of discouraging the establishment of roads not in the secondary system of State highways was altered.

The enactment of § 33.1-225.3, Code of Virginia (1950), as amended, (Appendix B to this Brief in Opposition) allows Fairfax County to expend funds on minor improvements and maintenance on roads not in the secondary system of State highways provided the roads are open for the public use. Ch. 43 [1978] Va. Acts of Assembly 76. The enactment of § 15.1-26.2 of the Code (Appendix C to this Brief in Opposition) allows all counties to expend general revenues for the construction and repair work on public roads not in the State highway system or the secondary system. Ch. 163 [1978] Va. Acts of Assembly 273.

In short, the statutory reasons for the County Respondents not being able to comply with the settlement agreement no longer exist. In all likelihood the Association's attempt to enforce the settlement agreement and the County Respondents' reluctance to perform is moot. There are, however, other reasons for the County Respondents' reluctance to perform, like mutual mistake of fact, not connected with the statutory reasons that may provide a continuing controversy. But such continuing controversy has already been submitted by the Association to the district court. A reversal of the court of appeals would accomplish nothing that is

not already occurring. Consequently, the request of the Association is moot.

CONCLUSION

Respondent Fugate is no longer a party litigant. But assuming that he is still a party litigant, the decision of the court of appeals is not in actual conflict with another court of appeals on the same facts nor is the decision of the court of appeals "so far departed from the accepted and usual course of proceedings." In fact, the decision is eminently correct and proper. Further, it appears that the statutory rationale of the County Respondents for not performing the settlement agreement for which specific performance is sought no longer exists by virtue of enactments of the 1978 General Assembly of Virginia and the issues on the merits are moot. Accordingly, a Writ of Certiorari should not be granted.

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November 20, 1978

APPENDIX

APPENDIX A

In The
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

Fairfax Countywide Citizens Association, et al.,	)	
Plaintiffs,	)	
v.	)	Civil
	)	Action No.
County of Fairfax, Virginia, et al.,	)	71-336-A
Defendants.	)	

ORDER

Pursuant to and for the reasons stated in the Court's memorandum opinion of September 27, 1976, attached hereto and made a part hereof,

The June 1, 1972 order of dismissal, heretofore entered herein, is hereby vacated and set aside and the above styled suit is hereby reinstated as to the defendants County of Fairfax, Virginia, William S. Hoofnagle, individually and as Chairman, Board of Supervisors, Fairfax County, Virginia, and Herbert F. Harris, II, Joseph Alexander, John Herrity, Alan H. Magazine, Audrey Moore, Martha Pennino, Rufus Phillips and James Scott, individually and as members of the Board of Supervisors, Fairfax County, Virginia, and/or their successors in office.

And the Board of Supervisors of Fairfax County, Virginia, is hereby directed and ordered to complete the performance of its part of the May 31, 1972 settlement agreement, as

modified by the written stipulation of the parties, which is attached hereto and made a part hereof, within the time herein set forth.

The upgrading of the remaining P.6 streets shall commence as and when the weather permits and be concluded on or before two years from the date of this order.

This order shall not be construed as prohibiting the parties by mutual agreement from dropping any of the remaining named P.6 streets from this law suit, or the County of Fairfax from acquiring the necessary rights-of-way if deemed needed for the herein required upgrading and maintenance, as the law provides for.

This case will remain on the docket of this Court for the entry of such further orders as may be necessary to assure compliance with this order and for the awarding of such reasonable counsel fees and costs as are deemed proper.

The Clerk will send a copy of this order to all counsel of record.

/s/ OREN R. LEWIS
United States Senior Judge

November 26, 1976

LIST OF P.6 ROADS REQUESTED BY THE COURT

Derek Road
Kingland Road
Unnamed Road #3
Unnamed Road #4
Stokes Lane
Unnamed Road #7
Cheryl Place
Courtland Drive
Dewey Jones Street
Hoffman's Lane
Poplar Lane
Sheppards Court
Williams Lane
Pine Lane (old segment)
Eighth Street
(two segments)
Clearview Drive
Costner Street
Random Road
Sampson Street
Scipio Lane
Tinners Hill Road
Bannerwood Drive
Porter Street
Amanda Place
Haney Lane
Marlewood Drive
Suncrest Lane
Marywood Road
Cottonwood Street
Unnamed Road #9
Rachel Road
Unnamed Road #5
Hope Park Road
First Road
Darkwood Drive
Old Mill Road
Dade Lane
Unnamed Road #10
Ashburton Avenue
Unnamed Road #2
Rynex Drive
White Pine Drive
Unnamed Road #1

APPENDIX B

ACTS OF ASSEMBLY

CHAPTER 43

An Act to amend the Code of Virginia by adding a section numbered 33.1-225.3, relating to funds for certain roads.

[S 253]

Approved March 9, 1978

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding a section numbered 33.1-225.3 as follows:

§ 33.1-225.3. Funds for roads not in the secondary system. — Notwithstanding the provisions of §§ 33.1-225 or 33.1-230, the governing body of any county under the urban county executive form of government may expend funds on minor improvements and maintenance of roads not within the secondary highway system, provided such roads are open for public use. A road shall be determined to be open for public use by applying the same standards set forth in § 33.1-184 or by final order of a court of competent jurisdiction on or before January one, nineteen hundred seventy-eight, except that in order to be eligible for funds under this section such roads need not be thirty feet in width but shall not be less than fifteen feet wide. The maximum amount of mileage to be maintained under this section shall not exceed thirty miles.

APPENDIX C

ACTS OF ASSEMBLY

CHAPTER 163

An Act to amend the Code of Virginia by adding a section numbered 15.1-26.2, relating to the use of county revenues for highway maintenance or construction.

[S 441]

Approved March 23, 1978

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding a section numbered 15.1-26.2 as follows:

§ 15.1-26.2. County revenues for highways.—Any county may expend so much of its general revenues as its governing body by unanimous vote of its members shall deem appropriate for the construction and repair work on public roads not in the State highway system or the secondary system and shall have authority to own and operate the properties and equipment necessary to carry out the provisions of this section.

Any county revenues expended for roads not a part of the highway system or secondary system shall not be considered to be highway funds which are made available for highway purposes pursuant to § 33.1-23.1 and shall not diminish funds paid to counties under § 33.1-23.1.